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No. 95-1173

In the Supreme Court of the United States

OCTOBER TERM, 1995

LOUISE J. HAMLET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Federal Claims lacked jurisdiction under the Tucker Act to review petitioner's discharge from employment where petitioner failed to demonstrate that she entered an employment contract with the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-22) is reported at 63 F.3d 1097. The opinion of the United States Court of Federal Claims (Pet. App. 23-30) is unreported.[1] The opinion of the Court of Federal

[1] Effective October 29, 1992, the United States Claims Court became the United States Court of Federal Claims. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4516. Although petitioner initiated her action in the claims court, we refer to the trial court by its current name.

Claims on petitioner's motion for reconsideration (App., *infra*, 17a-20a)[2] also is unreported.

The first opinion of the Court of Federal Claims (App., *infra*, 1a-12a) is reported at 14 Cl. Ct. 62. The first opinion of the court of appeals (Pet. App. 35-42) is reported at 873 F.2d 1414. The second opinion of the court of appeals (Pet. App. 31-34) is noted at 14 F.3d 613 (Table). The second opinion of the Court of Federal Claims (App., *infra*, 13a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1) was entered on August 17, 1995. A petition for rehearing was denied on October 27, 1995. Pet. App. 2. The petition for a writ of certiorari was filed on January 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Soil Conservation and Domestic Allotment Act, ch. 104, 49 Stat. 1148 (codified as amended at 16 U.S.C. 590h(b)), provides for the creation and operation of the Agricultural Stabilization and Conservation Service (ASCS) and the state, county and local committees of the ASCS. The ASCS is an agency of the United States Department of Agriculture (USDA). The state committees are appointed by the Secretary of Agriculture (the Secretary), while the local and county committees are elected by local farmers. 16 U.S.C. 590h(b).

The statute provides that "[t]he Secretary shall make such regulations as are necessary relating to the selection and exercise of the functions of the

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[2] Three of the earlier opinions below have been reproduced in appendices to this brief.

respective committees, and to the administration, through such committees, of such programs." 16 U.S.C. 590h(b). In accordance with this provision, the Secretary has promulgated regulations governing the state, county, and local committees. 7 C.F.R. Pt. 7.[3] The regulations provide that the county committee shall select a secretary, who serves as the county executive director. 7 C.F.R. 7.11(b), 7.21(b)(2). The county executive director "employ[s] the personnel of the county office to serve at the pleasure of the county executive director." 7 C.F.R. 7.25(b)(1).

Procedures governing the suspension and removal of employees of the county committee are set forth in 7 C.F.R. 7.28-7.34. County committee employees are entitled to an administrative hearing and must be given an opportunity to cross-examine witnesses. 7 C.F.R. 7.32. The determination of the Deputy Administrator, State and County Operations, ASCS (Deputy Administrator) in such matters is final and is not subject to further administrative review. 7 C.F.R. 7.33.

Pursuant to 7 C.F.R. 7.36, the ASCS issued the ASCS handbook, County Office Personnel Management, 22-PM (22-PM).[4] Under the 22-PM handbook, all ASCS county employees are employed by appointment. Paragraph 95(A) of 22-PM states that "[p]ermanent appointments shall be used for the employment of FULL-TIME or PART-TIME employees who are expected to work more than one year." Under Paragraph 465 of the 22-PM handbook, only

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[3] Code of Federal Regulations (C.F.R.) citations are to the 1985 regulations because petitioner was terminated in 1985.

[4] Petitioner based her complaint upon the version of the 22-PM manual in effect when she was terminated in 1985.

employees serving under appointment are eligible to participate in the Civil Service Retirement System (CSRS); under Paragraph 628, only employees serving under appointment may enroll in a federal health benefits program. The 22-PM manual mentions employment by contract only in one provision (Paragraph 91), which states that ASCS county offices should "obtain professional janitorial services through contract."

2. Petitioner was employed as a program assistant in the Charlotte County, Virginia, office of the ASCS. Pet. App. 4. She was not employed directly by the USDA, but was employed by the county committee. *Ibid.* She was hired by the county executive on November 19, 1956,[5] and was discharged on November 4, 1985. *Ibid.* Because petitioner was a county committee employee, she was subject to the provisions for suspension and removal set forth in 7 C.F.R. 7.28-7.34, and was a "permanent appointee" under the 22-PM manual. As a permanent appointee, petitioner was covered by the CSRS and was enrolled in the Federal Employees Health Benefits program. Pet. App. 9.

Petitioner's discharge resulted from an investigation initiated by the USDA Office of the Inspector General (IG). The investigation addressed complaints of irregularities in the administration of a certain tobacco lease and transfer program. App., *infra*, 1a-3a. The complaints alleged that petitioner had shown favoritism to certain individuals and had acted as a third party in arranging leases. *Id.* at 2a. The IG concluded that:

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[5] The ASCS regulations, 7 C.F.R. Pt. 7, predate petitioner's employment. 21 Fed. Reg. 8385 (Nov. 2, 1956).

1. According to witness statements, a review of available records, and HAMLET'S statement, she acted as an agent, broker, or finder and negotiated tobacco quota leases and sales for the benefit of herself, her son, or other tobacco producers.
2. According to witness statements, a review of available records, and HAMLET'S statement she post-dated, back-dated, or otherwise changed tobacco leases. HAMLET has signed her son's name to tobacco leases.
3. According to information furnished by witness statements and HAMLET'S statement she has engaged in partisan political activities.

Ibid. The activities with which petitioner was charged were prohibited by 7 C.F.R. 7.28(a), which lists suspension and removal as penalties for engaging in such prohibited activities. Based upon the IG's findings, a removal action was initiated against petitioner in accordance with ASCS regulations, 7 C.F.R. 7.29-7.34. App., *infra*, 2a-3a. The removal proceedings afforded petitioner a full opportunity to respond to the charges, including an administrative appeal. *Ibid.* At the administrative hearing, petitioner was represented by counsel. *Id.* at 16a. She presented evidence to refute the charges contained in the IG report, *id.* at 3a, and cross-examined the witnesses presented by the USDA, *id.* at 16a. The hearing officer recommended that all charges be sustained. Petitioner's removal became final on or about November 4, 1985. *Id.* at 2a.

3. On May 5, 1986, petitioner filed a complaint in the Court of Federal Claims. The court dismissed the complaint for lack of jurisdiction, stating that petitioner's employment was governed by statute, not by

contract. App., *infra*, 10a. The court of appeals vacated and remanded, holding that petitioner should be allowed to prove the existence of an implied-in-fact contract governing her employment. Pet. App. 40.

Following a trial on the merits, the Court of Federal Claims concluded that, if a contract existed, petitioner had failed to demonstrate that it had been breached. App., *infra*, 15a-16a. The court of appeals vacated and remanded, because the trial court's findings of fact and conclusions of law were insufficient to permit meaningful appellate review. Pet. App. 31-34. On remand, the Court of Federal Claims again dismissed for lack of jurisdiction, finding that petitioner had established neither the requisite elements of an implied-in-fact contract nor a breach of such a contract. *Id.* at 23-26.[6]

The court of appeals affirmed. It determined that the record evidence demonstrated that petitioner did

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[6] The Court of Federal Claims found that petitioner did not carry her burden of proof. Petitioner's evidence consisted of approximately one hour of her own testimony, during which she denied four of the five allegations that resulted in her termination. Pet. App. 25-26; App., *infra*, 15a.

Petitioner misrepresents the conclusion of the Court of Federal Claims by suggesting that it found that she possessed a contract with the United States. Pet. 8-10. After a one-day trial on February 14, 1992, which was limited to the issue of whether any implied-in-fact contract could have been created under the circumstances of this case, the court determined: "At the close of evidence, it was not clear that an implied contract of employment had not been created." App., *infra*, 15a. After a trial on the merits on July 13, 1992, the court found that "[i]f [petitioner] had an express or implied contractual relationship with the United States, she has not proved that the terms of that contract were violated." *Id.* at 16a.

not have an employment contract with the United States (Pet. App. 7-9).[7]

ARGUMENT

1. The Tucker Act, 28 U.S.C. 1491, states in pertinent part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Tucker Act is a jurisdictional statute that "does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan*, 424 U.S. 392, 398 (1976). The Act confers jurisdiction upon the Court of Federal Claims when certain substantive rights, such as contract claims, exist. *Ibid.*

Petitioner contends that the Court of Federal Claims had jurisdiction over her claim under the

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[7] The court of appeals also determined that the ASCS personnel manual, 22-PM, was not a statute or regulation that mandated compensation by the federal government for the damages that were allegedly sustained. Pet. App. 9-21. In so holding, it determined that the back pay provision in the 22-PM manual was invalid because it contravened a congressional statute, the Back Pay Act, 5 U.S.C. 5596. Pet. App. 19-20. In addition, the court of appeals held that petitioner's claims under the First and Fifth Amendments to the Constitution were insufficient, in themselves, to sustain the court's jurisdiction. *Id.* at 21. Petitioner does not challenge the court's rulings with respect to her regulatory or constitutional claims.

Tucker Act because she had an implied employment contract with the United States. Pet. 7-11. Petitioner's contract claim rests on the assertion that she was "promised pay in exchange for work and was told she had a job as long as she did a good job." Pet. 8. The only evidence that petitioner offered at the July, 1992 trial was "approximately one hour [of testimony by petitioner] about the events leading up to her termination." App., *infra*, 15a; Pet. App. 25. The Court of Federal Claims noted that petitioner had the burden to demonstrate the existence of a contract and its breach, and held that petitioner failed to carry that burden. Pet. App. 24-25.

The court of appeals correctly held that petitioner did not rebut the presumption that a federal employee is employed by appointment, not by contract. Pet. App. 9. As noted by the court of appeals (*ibid.*) and the Court of Federal Claims, public employment generally does not turn on contract theory, but is "accomplished by appointment and controlled by statute, regulation, and Executive Order." *Id.* at 29, citing *Bigler* v. *United States*, 230 Ct. Cl. 985, 986 (1982). See also *Chu* v. *United States*, 773 F.2d 1226, 1229 (Fed. Cir. 1985) ("[A]bsent specific legislation, federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government."). Here, the record evidence supported the presumption that petitioner's service with the ASCS was by appointment.

The applicable agency instructions in the 22-PM manual provide that "permanent appointments" shall be used for all employees who are expected to work more than one year. Petitioner clearly fell within that category. In addition, petitioner had enrolled in

the Federal Employees Health Benefits program and in the CSRS, which were available only to those employees having permanent appointments. Pet. App. 8-9. The Court of Federal Claims correctly determined that the evidence offered by petitioner was insufficient to overcome the presumption, and the evidence, that petitioner was an appointee. *Id.* at 10-11.[8]

2. Petitioner contends (Pet. 9) that this Court's decision in *United States* v. *Hopkins*, 427 U.S. 123 (1976), supports her implied contract claim. In *Hopkins*, this Court held that the Court of Federal Claims erred in its determination that employees of the Army and Air Force Exchange Service (AAFES) could never serve by contract. *Id.* at 129. The Court held that the applicable administrative regulations would permit employment by implied contract, noting that AAFES regulations stated that ordinary employees hold their positions by appointment, but established different procedures for contracting. *Id.* at 127-129. The Court acknowledged, however, that appointed employees would not be entitled to sue the

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[8] Petitioner contends (Pet. 8) that the court of appeals erred in stating that her right to damages for breach of an employment contract rested solely upon the ASCS backpay instruction found in Paragraph 455 of the 22-PM manual (Pet. App. 12 n.4). Petitioner points out that she was hired in 1956, before 22-PM had been issued, and argues that her contract existed independently of 22-PM. The court of appeals correctly noted, however, that petitioner's contentions that her alleged contract had been *breached* and that the appropriate remedy for the breach was back pay were based entirely on terms contained in the 22-PM manual. Pet. App. 8 & n.3. In any event, as noted, petitioner offered little or no independent evidence that an employment contract existed.

government on an implied contract theory. *Id.* at 129-130. Here, the court of appeals examined the statutory and regulatory provisions applicable to county committee employees, and determined that petitioner was an appointee. Pet. App. 8. That determination was entirely consistent with the holding and reasoning of *Hopkins*.

The court of appeals' decision also is consistent with *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 735-737 (1982). In *Sheehan*, this Court examined the record and the relevant agency regulations and concluded that the respondent in that case was employed by appointment, rather than by contract. Thus, the Tucker Act did not confer jurisdiction over the respondent's contract claim against the United States. In this case, the court of appeals followed *Sheehan* by examining the record and the relevant agency regulations, and then concluding that petitioner served by appointment. Pet. App. 8.

3. Petitioner contends (Pet. 12-14) that she was not an appointee because there is no category of "appointees" who are not covered by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (its relevant parts codified, as amended, in various sections of 5 U.S.C.) (CSRA). Petitioner is not covered by the CSRA because she is not an "employee" under 5 U.S.C. 2105(a).[9] Petitioner contends

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[9] A federal "employee" is defined by the CSRA as someone who is

> (1) appointed in the civil service by one of the following acting in an official capacity—
>
> (A) the President;
>
> (B) a Member or Members of Congress, or the Congress;

that the word "appointee" refers only to those who are "employees" under 5 U.S.C. 2105(a). Petitioner appears to argue that any federal employee who is not subject to the CSRA must be employed by contract and may sue the government under the Tucker Act. Pet. 11-12.

Petitioner cites no authority to support her reading of Section 2105(a), and this Court's precedents contradict her interpretation. In *Hopkins*, the Court stated that whether an employee serves by appointment or contract should be determined by analyzing "statutes and regulations * * * in light of whatever evidence is adduced * * * as to plaintiff's particular status." 427 U.S. at 130. That holding clearly contemplates the consideration of more than whether the plaintiff is an "employee" under Section 2105(a). Moreover, the plaintiff in *Sheehan* was not an "employee" covered by the CSRA, but

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(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation; or

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

5 U.S.C. 2105(a). "Employees," as defined by Section 2105(a), are entitled to extensive remedies under the CSRA. See *Bush* v. *Lucas*, 462 U.S. 367, 368 (1983); *Krueger* v. *Lyng*, 927 F.2d 1050, 1053-1054 (8th Cir. 1991).

nevertheless was deemed an "appointee" by the Court. See *Sheehan*, 456 U.S. at 735-737.

4. Petitioner's final argument is that the Court of Federal Claims must have jurisdiction to review her allegedly unlawful removal, or else she will be denied judicial review of her claim and will "have no rights whatsoever." Pet. 15. Congress, however, empowered the Secretary to establish regulations governing the employment of county and local committee personnel, and the Secretary permissibly established a removal process that does not include judicial review. A former federal employee does not have an inherent right to judicial review of discharge proceedings. *United States* v. *Fausto*, 484 U.S. 439, 448-449, 452 (1988). Petitioner's administrative hearing—at which she was represented by counsel and was given the opportunity to present evidence and cross-examine witnesses—afforded her due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1996

APPENDIX A

UNITED STATES CLAIMS COURT

No. 281-86C

LOUISE J. HAMLET, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

[FILED: JAN. 6, 1988]

OPINION

ROBINSON, Judge.

INTRODUCTION

This claim for damages and injunctive relief is before the Court on the defendant's motion to dismiss the complaint for lack of jurisdiction pursuant to Rule 12 of the RUSCC. The motion alleges that dismissal is required because (i) the plaintiff's claims for damages are beyond the jurisdiction of the Claims Court, and (ii) the plaintiff's complaint fails to state a claim upon which relief may be granted under the Back Pay Act. Both allegations in the motion are meritorious. The defendant's motion is granted and the plaintiff's motion to transfer the case to a district court is denied for the reasons discussed herein.

FACTS

Plaintiff, Ms. Louise J. Hamlet, was employed as a County Program Assistant in the Charlotte County, Virginia, Agricultural Stabilization and Conservation Service ("ASCS"), from November 19, 1956, until her removal on November 4, 1985.

Upon receiving complaints concerning irregularities in the flue-cured tobacco lease and transfer program administered through the Charlotte County ASCS office, the Office of the Inspector General, United States Department of Agriculture ("USDA") initiated an investigation. These complaints alleged that Ms. Hamlet had "shown favortism to certain individuals" and had "acted as a third party in arranging leases." The Inspector General's Office concluded that:

> 1. According to witness statements, a review of available records, and HAMLET'S statement, she acted as an agent, broker, or finder and negotiated tobacco quota leases and sales for the benefit of herself, her son, or other tobacco producers.
>
> 2. According to witness statements, a review of available records, and HAMLET'S statement she post-dated, back-dated, or otherwise changed tobacco leases. HAMLET has signed her son's name to tobacco leases.
>
> 3. According to information furnished by witness statements and HAMLET'S statement she has engaged in partisan political activities.

Based upon the findings of the Inspector General's Office, the ASCS initiated a removal action against

Ms. Hamlet in accordance with USDA regulations codified at 7 CFR §§ 7.29-.34 and relevant ASCS regulations. The removal proceedings afforded Ms. Hamlet a full opportunity to respond to the charges, including an administrative appeal. That appeal gave consideration to evidence adduced by Ms. Hamlet. (Def.App. at 1). Ms. Hamlet's removal became final on or about November 4, 1985. (Comp. ¶ 18)

By complaint filed May 5, 1986, in this Court, Ms. Hamlet seeks monetary damages and injunctive relief. She alleges that she is entitled to relief in this Court under the Tucker Act, 28 U.S.C. § 1491, the First and Fifth Amendment to the United States Constitution, and the USDA's regulations and policy manuals promulgated pursuant to 16 U.S.C. §§ 590D-590H(b) and ASCS's Personnel Policy Manual 22-PM (Rev. 1), Section 4—Removal for Cause (Exhibit A to Petition). The complaint also states that since the state law claim alleged in the complaint is derived from the same nucleus of operative fact as the federal claims, this Court should exercise pendant jurisdiction over the state claims. The complaint, in summary, seeks plaintiff's reinstatement, back pay, benefits, step increases, interest, and other damages and benefits as though her service had remained unbroken, expunging of all references to and reflections of her wrongful discharge and modifica-tion of her records to show continuous satisfactory service from the date of her discharge to the time of her restoration to her position. The total damages sought by Ms. Hamlet are $250,000 plus attorneys fees and court costs.

DISCUSSION

This Court's jurisdiction is set forth in the Tucker Act, as codified at 28 U.S.C. § 1491 (1982). In pertinent part § 491(a)(1) states: The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

However, the Tucker Act does not create any substantive right enforceable against the United States for money damages. United *States v. Mitchell*, 463 U.S. 206, 216, 103 S.Ct. 2961, 2967, 77 L.Ed.2d 580 (1983). To recover, a party must demonstrate that the basis for its substantive rights exists in some other source of law such as the Constitution, or Act of Congress or executive department regulation. *Id.* Furthermore, the violation of the substantive right at issue must be fairly interpreted as mandating the payment of compensation from the Federal Government to allow recovery of money damages. *Id.* at 218, 103 S.Ct. at 2968; *Eastport Steamship Corp. v. United States*, 178 Ct.Cl. 599, 605-07, 372 F.2d 1002, 1007-09 (1967); *United States v. Testan*, 424 U.S. 392, 400, 96 S.Ct. 948, 954, 47 L.Ed.2d 114 (1976); *Austin v. United States*, 206 Ct.Cl. 719, 723, *cert. denied*, 423 U.S. 911, 96 S.Ct. 215, 46 L.Ed.2d 140 (1975).

It follows from the jurisdiction of the Court that a complaint before the Court must include:

> A clear citation of the Act of Congress, regulation of an executive department or agency, or Executive order of the President, where the claim is founded upon such an act, regulation, or order. RUSCC 9(h)(2).

Thus, the issue is whether Ms. Hamlet has identified any law, rule, or regulation which provides a right to recover damages from the United States for her allegedly improper removal. The Court finds that she has not.

Ms. Hamlet's complaint seeks relief under the First Amendment and the due process clause of the Fifth Amendment of the Constitution. However, the First Amendment does not provide a basis for relief under the Tucker Act. *United States v. Connolly*, 716 F.2d 882, 887 (Fed.Cir.1983). Further, it is well established that the due process clause provides no basis for relief in the Claims Court. *Inupiat Community of the Arctic Slope v. United States*, 230 Ct. Cl. 647, 662, 680 F.2d 122, 132 (1982); *Mack v. United States*, 225 Ct. Cl. 187, 192, 635 F.2d 828, 832 (1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1988, 68 L.Ed.2d 304 (1981). Thus, this Court lacks jurisdiction over Ms. Hamlet's First and Fifth Amendment claims as Ms. Hamlet has not demonstrated that a violation of either Constitutional provision mandates the payment of compensation from the Federal Government.

On brief, Ms. Hamlet argues that she has a right to redress of her grievances in this Court pursuant to the Back Pay Act. The Back Pay Act provides a remedy for a federal employee who has been affected by an "unjustified or unwarranted personnel action." 5 U.S.C. § 5596(b)(1). An "employee" for purposes of

the Back Pay Act is an individual who satisfies the elements set forth in 5 U.S.C. § 2105(a). *Lambert v. United States*, 4 Cl. Ct. 303, *aff'd*, 746 F.2d 1490 (Fed.Cir.1984). Thus, "employees" are individuals who are:

> (1) appointed in the civil service by one of the following acting in an official capacity . . .
>
> (a) The President;
>
> (b) a Member or Members of Congress, or the Congress;
>
> (c) a member of a uniformed service;
>
> (d) an individual who is an employee;
>
> (e) the head of a Government controlled corporation;
>
> (f) an adjutant general designated by the Secretary concerned under Section 709(c) of Title 32;
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

All three elements must exist for an individual to be classified as an employee. *Horner v. Acosta*, 803 F.2d 687 (Fed.Cir.1986); *Costner v. United States*, 229 Ct. Cl. 87, 665 F.2d 1016 (1981); Lambert, 4 Cl.Ct. at 305.

Ms. Hamlet contends that she was an "employee" of the United States. She asserts that she was both an "individual employed in or under an agency," 5 U.S.C. § 5102(a)(2), and an "employee of an agency" within

the meaning of the Back Pay Act, 5 U.S.C. § 5596(b)(1). Specifically, she claims she was employed by the United States Department of Agriculture, which is an "executive department" and an "executive agency" of the United States Government. Her job number, as set by the USDA, was SJH004, and her pay grade, as set by the USDA, was CO-4, step 9. Her salary increases were in accordance with the General Schedule Rates established under 5 U.S.C. § 5332. In addition, she participated in the Civil Service Retirement System. However, Ms. Hamlet has failed to address the fact that 5 U.S.C. § 2105 controls the definition of employee in Title 5, "except as otherwise provided by [§ 2105] or when specifically modified." The Court does not find that either 5 U.S.C. § 5102 or 5 U.S.C. § 5596 has specifically modified the definition of employee in 5 U.S.C. § 2105. Thus, the central issue is whether Ms. Hamlet's employment resulted from an appointment by an individual who was a federal employee, which would bring her within the provisions of the Back Pay Act.

In Ms. Hamlet's county in Virginia, any person having an interest in a farm is eligible to vote for the members of the ASCS community committee. 7 CFR § 7.5 (1985). In turn, these community committee members serve as delegates to a county convention, at which the county committee members are elected. 7 CFR §§ 7.11(a), 7.12. The county committee employs the county executive director, who serves at the pleasure of the county committee, 7 CFR § 7.21(b), and is responsible for carrying out the policies established by the county committee. 7 CFR § 7.26(a). The county executive also hires clerical and other

personnel. This individual is the one who hired or retained Ms. Hamlet as a County Program Assistant, a position in the county office. 7 CFR § 7.26(b).

Based upon these facts, no employee hired by the county executive can demonstrate that he or she was appointed by an individual who is an employee under 5 U.S.C. § 2105(a). *Norday v. Dept. of Agriculture*, ASCS, No. SLO7528210231 (MSPB Oct. 19, 1982), Def.App. at 12; *Meland v. Dept. of Agriculture*, No. DE03518020043 (MSPB August 4, 1980), Def.App. at 18.

The *Meland* case is factually very similar to this case. In *Meland*, the appellant was a Reporter, Wool and Price Support Clerk with the Cascade County ASCS office in Great Falls, Montana. The Board noted that the appellant received a government check, his salary increases were in conformity with the Federal Employees Pay Comparability Act of 1970, that ASCS employees participate in the civil service retirement program, and that ASCS runs its programs in accordance with USDA regulations. However, the Board concluded that because the appellant had not received an appointment from an official who met the definition of employee under 5 U.S.C. § 2105, the appellant, Mr. Meland, was not an employee for purposes of this section either.

Since Ms. Hamlet's position came about through appointment by an Executive Director who was not himself a federal employee, Ms. Hamlet is also not an employee under the provisions of 5 U.S.C. § 2105(a)(2)(D). Thus, she is not entitled to any relief under the provisions of the Back Pay Act. *Meland v. Dept. of Agriculture, supra.*

Ms. Hamlet further contends that absent the remedy sought in this Court, she would have no remedy whatsoever against the United States for her allegedly wrongful discharge. The fact that she is not a civil service employee within the meaning of 5 U.S.C. § 2105(a) means that she has no right of redress for her allegedly wrongful discharge through the schemes of administrative and judicial remedies established by the Civil Service Reform Act. See, 5 C.F.R. § 6.4. Nor does Ms. Hamlet have recourse to the Merit Systems Protection Board. *See, Pavao v. Merit Systems Protection Board*, 762 F.2d 988 (Fed.Cir.1985). Ms. Hamlet relies on *Fausto v. United States*, 791 F.2d 1554 (Fed.Cir.1986), *cert. granted*, — U.S. ——, 107 S.Ct. 872, 93 L.Ed.2d 827 (1987), as support for her position that the Claims Court must accept jurisdiction over her claims lest she "be left in the anomolous position of having a right without a remedy." Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss at 7. The Court finds, though, that Fausto is inapposite to Ms. Hamlet's claims.

In *Fausto*, the Court of Appeals for the Federal Circuit held that a plaintiff who is accorded no right of redress by appeal to the Merit Systems Protection Board under the Civil Service Reform Act may bring his claim to the Claims Court pursuant to the Court's Tucker Act/Back Pay Act jurisdiction. However, in Fausto, the plaintiff met the definition of "employee" set out in 5 U.S.C. § 2105(a). Thus, he was able to identify an underlying statute, the Back Pay Act, which according to the Federal Circuit entitled him to monetary compensation from the United States and, therefore, satisfied the jurisdictional require-

ments of the Tucker Act. Ms. Hamlet, though, is not an "employee" as defined in Title 5 for purposes of the Back Pay Act. Nor has Ms. Hamlet identified any other provision of law which entitles her to money damages from the United States. The Court finds, therefore, that she has failed to show Tucker Act jurisdiction in this Court. Thus, the Court is precluded from hearing any of Ms. Hamlet's claims.

Ms. Hamlet alleges on brief that she had an express or implied employment contract with the United States Government which was demonstrated, *inter alia*, by the agency rules set out in the complaint. She contends that such rules can and do give rise to suits against an employer, citing *Barger v. General Electric*, 599 F.Supp. 1154 (W.D.Va.1984) and *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980).

The defendant counters that the federal employment relationship is statutory and not contractual. *Riplinger v. United States*, 695 F.2d 1163 (9th Cir.1983); *Kania v. United States*, 227 Ct. Cl. 458, 650 F.2d 264, *cert. denied*, 454 U.S. 895, 102 S.Ct. 393, 70 L.Ed.2d 210 (1981). Thus, the defendant argues, that although a remedy for the breach of an implied-in-fact contract in the employer/employee relationship may exist in the private sector, as demonstrated by the cases cited by Ms. Hamlet, a federal employee has no right against the United States under an implied contract theory.

The defendant's argument is correct with respect to the non-existence of an express or implied employment contract. The Federal employment relationship is governed by statute and regulations. *Urbina v. United States*, 192 Ct. Cl. 875, 428 F.2d 1280 (1970).

The Court finds that Ms. Hamlet had neither an express nor implied contract with the United States as a result of her employment with the Charlotte County ASCS.

It requires no lengthy analysis to dispose of Ms. Hamlet's claim for damages arising from the alleged intentional infliction of emotional distress. This Court simply has no jurisdiction over any such tort claim against the United States. 28 U.S.C. § 1491(a)(1). Thus, Ms. Hamlet's request that the Court consider her tort claim as a pendant claim over which jurisdiction may be extended must be denied because of the Court's jurisdictional limits as defined in the Tucker Act. *E.g., L'Enfant Plaza Properties, Inc. v. United States*, 227 Ct.Cl. 1, 645 F.2d 886 (1981).

Finally, Ms. Hamlet requests that this Court transfer that portion of her claims which is beyond this Court's jurisdiction to the appropriate Federal District Court. In support of her requested transfer, she cites 28 U.S.C. § 1631 which provides for the transfer of an action to any other Federal Court before which the action could have been brought at the time it was filed in the Claims Court. The defendant opposes the transfer contending that none of Ms. Hamlet's claims could have been brought before any other Federal Court. Specifically, the defendant asserts she has no right to a transfer of her back pay claims since no other such court had jurisdiction over her claims at the time they were filed in this Court. Thus, the plaintiff would suffer from the same jurisdictional defects in the District Court as she does here. Under this circumstance it would not be in the interest of justice to transfer this case. Further, the defendant argues that Ms. Hamlet has no right to

transfer of her tort claim since she has not shown that she has exhausted her administrative remedies, a prerequisite to commencing a tort action under the provisions of the Federal Tort Claims Act. 28 U.S.C. § 2675. The Court agrees and finds that Ms. Hamlet's request for transfer of her claims must be denied. *Id.*

CONCLUSION

The plaintiff's claims for monetary damages are beyond the jurisdiction of this Court. Further, the complaint fails to state a claim upon which relief can be granted under the Back Pay Act or any other similar act, law, rule, or regulation. Therefore, the Court grants the defendant's motion to dismiss. The plaintiff has failed to show that any of her claims could have been brought before another court at the time of filing of her complaint in this Court. In the interests of justice, no transfer of her claims should be made. Therefore, the Court denies plaintiff's motion to transfer such claims to a Federal District Court. The Clerk will dismiss the complaint. Each party shall bear its own costs.

IT IS SO ORDERED.

APPENDIX B

IN THE UNITED STATES CLAIMS COURT

No. 281-86C

LOUISE J. HAMLET, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[FILED: OCT. 2, 1992]

OPINION

HODGES, Judge.

This case was filed on May 5, 1986 and dismissed in 1988 for lack of jurisdiction and for failure to state a claim upon which relief may be granted. *Hamlet v. United States*, 14 Cl. Ct. 62 (1988). Plaintiff appealed, and the United States Court of Appeals for the Federal Circuit vacated that order and remanded. *Hamlet v. United States*, 873 F.2d 1414 (Fed. Cir. 1989). The remand was assigned to this court.

During a hearing on the meaning of the remand order, plaintiff argued that she was entitled to a trial on the merits of her case. Defendant renewed its motion to dismiss or for summary judgment.

Mrs. Hamlet was an employee of the Agricultural Stabilization and Conservation Service who was

dismissed from her position after 29 years on the job. The termination followed an investigation by the United States Department of Agriculture Inspector General of alleged violations of USDA rules concerning political activity and conflict of interest. She pursued all avenues of appeal afforded by ASCS and USDA regulations before filing suit in the Claims Court. The factual details are set out in *Hamlet v. United States*, 14 Cl. Ct. 62 (1988). In essence, that court granted defendant's motion for summary judgment before Mrs. Hamlet had not "identified any law, rule, or regulation which provides a right to recover damages from the United States for her allegedly improper removal." *Id.* at 65. The Federal Circuit found that Mrs. Hamlet may not have been a duly appointed "federal employee," and therefore not subject to rules and regulations which govern those relationships. The appeals court suggested that plaintiff may have had an implied contract of employment with ASCS.

The key Federal Circuit holding for this court to consider on remand was the following: "We cannot say that there is no set of facts Hamlet could prove which would entitle her to relief on her allegations that an implied-in-fact contract had been created by the Personnel Manual provisions covering her employment and that this contract was breached as a result of her removal." *Hamlet*, 873 F.2d at 1417.

We ruled that this language was a "direction from the Federal Circuit to give Ms. Hamlet the opportunity to prove that she had an implied-in-fact contract with the federal government and that this contract was breached by the process of her termination. Such proof presumably would include any evidence or oral or written promises or other

assurances that were made to her by government employees, to the extent that they were authorized to bind the United States." We noted that the Federal Circuit apparently preferred a trial of this case, "or at least an opportunity for plaintiff to present evidence of an employment contract implied-in-fact."

We held a one-day trial in Lynchburg, Virginia on February 14, 1992, limited to the issue of whether an implied-in-fact contract could have been created under the circumstances of this case. At the close of evidence, it was not clear that an implied contract of employment had not been created.

The case was suspended for a period of 30 days during which the parties would discuss settlement. Ultimately these efforts failed. Thereupon, we ruled that plaintiff had made "at least a *prima facie* showing that she had a contract with the United States, as defined by the Federal Circuit opinion which controls this case." Trial on the merits of Mrs. Hamlet's claim against the Department of Agriculture was scheduled for three days beginning July 13, 1992 in Lynchburg.

On the morning of trial, plaintiff testified for approximately one hour about the events leading up to her termination. During that testimony, she denied four of the five reasons given by defendant to terminate her employment; she admitted the fifth charge. After defendant cross-examined Mrs. Hamlet, plaintiff rested her case. Defendant moved for dismissal on the grounds that plaintiff had not met her burden of proof.

Plaintiff apparently thought that her testimony denying the charges against her (except for one) was sufficient to prove that she was innocent of the charges which precipitated her dismissal. Though

she listed more than 30 witnesses for trial, plaintiff decided to rely on her testimony alone. She represented to the court that other witnesses' testimony would be cumulative of her own. We had no choice but to grant defendant's motion.

Mrs. Hamlet's case had been considered by the Charlotte County ASC Committee and appealed to the Virginia State ASC Committee. At the state level, she was represented by counsel and she cross-examined witnesses. The State Committee affirmed the action taken below.

Plaintiff argued that the State Committee merely rubber-stamped the ruling at the county level. However, we had no evidence to suggest that this is true. No evidence supports Mrs. Hamlet's assertion that her arguments were not considered. In absence of such evidence, we must assume that state officials handled her case conscientiously and in good faith.

CONCLUSION

If Mrs. Hamlet had an express or implied contractual relationship with the United States, she has not proved that the terms of that contract were violated. She has not proved that regulations of the United States affecting her employment were violated. She has not proved that she was treated unfairly by the State or County ASC Committees, or that her Constitutional rights were violated by any government policies or procedures. Defendant's motion to dismiss her complaint is therefore GRANTED. The Clerk will enter judgment accordingly. No costs.

APPENDIX C

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 281-86C

LOUISE J. HAMLET, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[FILED: Dec. 18, 1992]

OPINION ON RECONSIDERATION

HODGES, Judge.

Mrs. Hamlet sued for money damages stemming from her termination from employment with the United States Department of Agriculture, Agricultural Stabilization and Conservation Service (ASCS). We dismissed plaintiffs claim at the close of her case because she did not meet her burden of proof. *Hamlet v. United States*, No. 86-281C (Cl. Ct. October 2, 1992).

At trial, plaintiff testified that she had done nothing wrong, then rested her case. The Government declined to put on any evidence and moved to dismiss.

Plaintiffs counsel argued that the Government must prove that it had good cause for terminating her.

Plaintiff contends that she sustained her burden of proof as matter of law because her denial of wrongdoing was not rebutted. We disagree. *See C. Itoh & Co. America, Inc. v. United States,* 678 F.2d 218 (Fed. Cir. 1982). We are not required to accept plaintiffs theory of the case solely because it was not refuted by a government witness. Plaintiffs opinion that she did nothing to merit being terminated did not prove to us that the Government terminated her without cause.

Plaintiff admitted on the stand that she contracted a farmer concerning a vote on County ASC committee, in violation of regulations. Plaintiff argues in her brief that the "Court itself found [her violation] to be an insufficient basis for dismissal in the hearing on July 13, 1992." This is incorrect. Counsel should review the trial transcript. For example:

> Page 93:
>
> > THE COURT: [This] may be a serious violation in County ASCS procedures. Maybe you are not supposed to call farmers for any reason . . . but it *sounds* like a minor thing.

Page 101:

> THE COURT: She admitted that she called [the voter], for example. Now . . . what disturbs me about all this is it *seems so minor.* But if she gets up here and admits that she did even one thing wrong . . . and then you close . . . it doesn't seem to me that you have proved a breach of contract . . .

Pages 111-112:

> MR. BELL: And so we are left with a phone call in 1982 to [the voter].
>
> THE COURT: And it sounds absurd. But what can I do about it?
>
> [I]t may be more serious than I know about—it may be more serious than it sounds—but she admitted it, whatever she did.

To suggest that the court "found" the basis of Mrs. Hamlet's dismissal to be insufficient is a misrepresentation of the record. Plaintiff had the burden to prove that termination for a minor violation constituted a breach of contract. Plaintiff failed to do so. Moreover, the record supports the likelihood that other violations pertained as well.

The other basis for plaintiff's request for reconsideration is that we addressed the case as a review of an administrative record rather than as a *de novo* proceeding. This also is incorrect. The reference in the Opinion to the Charlotte County ASC committee and the Virginia State ASC committee addressed Mrs. Hamlet' assertion that her arguments were not considered at the administrative level, and that her Constitutional right to due process was thereby

violated. This was one of her arguments, not a basis for our ruling that plaintiff did not meet her burden of proof during trial.

Plaintiffs motion for reconsideration is DENIED.